



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE

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MARY F. McTIGUE
DIRECTOR

May 4, 1992
AO-92-07

Dinesh Patel, M.D.
Board of Registration in Medicine
Commonwealth of Massachusetts
Ten West Street
Boston, MA 02111

Re: Public Employee Forgoing Compensation

Dear Dr. Patel:

This letter is in response to your March 9, 1992, letter requesting an advisory opinion regarding the applicability of M.G.L. c.55, ss.13-15 to certain activities.

You have stated that you serve as chairman of the Board of Registration in Medicine ("Board"). The Board consists of seven members appointed by the Governor, who are residents of the Commonwealth and who are entitled to receive thirty-five dollars for each day or part thereof spent performing their duties.¹ Five of the Board members must be physicians registered under M.G.L. c.112, s.2, and two must be representatives of the public. A term of office is three years. Board service involves attendance at full Board or subcommittee meetings for approximately half a day per week.

You have further stated that you have notified the Governor that you would forgo any of the compensation to which you are entitled by law and have no intention of claiming such compensation during your term of service on the Board. It is

1. M.G.L. c.13, s.10, which establishes the Board, provides that members shall be "paid thirty-five for each day or part thereof spent in performing their duties." Members are also reimbursed for necessary traveling and other expenses. Section 10 also provides that Board members may be removed by the Governor for neglect of duty, misconduct, malfeasance or misfeasance. These provisions were all added to the statute by Chapter 362 of the Acts of 1975.

my understanding that your decision to forgo compensation was based, at least in part, on the advice of this Office's General Counsel, Peter Sturges, ("Counsel") that a Board member would be exempt from the restrictions of M.G.L. c.55, s.13 if that member irrevocably declined all compensation from the Commonwealth. Such a conclusion would imply that Board members renouncing compensation would be legally able to solicit political contributions from anyone including, I would specifically note, doctors licensed by the Board.²

I. Discussion - Based upon the facts noted above, you have asked a number of specific questions which are answered by determining whether a Board member is a "person employed for compensation . . . by the commonwealth" within the meaning M.G.L. c.55, s.13 and the impact of a Board member's forgoing his or her compensation. After answering that question, I will address your specific questions.

M.G.L. c.55, s.13 provides, in pertinent part:

No person employed for compensation, other than an elected officer, by the commonwealth or any county, city or town shall directly or indirectly solicit or receive any gift, payment, contribution, assessment, subscription or promise of money or other thing of value for the political campaign purposes of any candidate for public office or of any political committee, or for any political purposes whatever. . . .

It has been the long-standing opinion of this Office that section 13's prohibition against solicitation by certain public employees applies to both full-time and part-time employees including persons who serve on various boards and commissions. Therefore, a Board member would be subject to section 13's restrictions if deemed "employed for compensation."

In earlier opinions, this Office had advised that small levels of compensation were "de minimus" and, therefore, did not rise to the level of compensation. See AO-88-18 (\$1,000 annual payment was "de minimus"), AO-89-10 (\$200 annual payment

2. This advice was rendered during a presentation by Counsel to the Board on Wednesday, October 9, 1991, in response to a specific question by you or another member of the Board. Because of Counsel's concerns about the implications of pursuing such a course, it was also noted that other laws such as M.G.L. c.268A, the conflict-of-interest law, or policy considerations of the Board, might also restrict such activity. Nonetheless, Counsel's advice was, at the time, the informal position of this Office.

was "de minimus"). However, these opinions have been superseded by more recent opinions which have advised that persons serving on boards and commissions are considered compensated if they are paid "any sum" for their services. See AO-90-05 and AO-90-10.³ Therefore, the payment of thirty-five dollars per day or part thereof would, in this Office's opinion, constitute compensation.

This Office has also advised on numerous occasions that persons wishing to participate in fundraising activities in connection with a campaign are exempt from the requirements of section 13 if they take an unpaid leave of absence of at least four months prior to a primary election or at least six months prior to a general election. See AO-88-06, AO-88-24, AO-89-08, AO-90-12, AO-90-16, AO-90-19, AO-91-24. In addition, this Office noted in one instance that a housing authority commissioner considering a run for public office would not be subject to the provisions of section 13 if he refused his stipend of \$1,600 at least four months prior to a primary and six months prior to an election.⁴ See AO-90-10. It was primarily on the basis of this opinion that Counsel informally advised that a Board member's forgoing his or her salary would exempt that member from the requirements of section 13. However, for the reasons discussed below, it is the Office's formal opinion that section 13 applies to you unless you take a leave of absence from your duties as a Board member and forgo your compensation.

It is important to reiterate the fundamental purpose of the provisions set forth in this statute. Section 13 is designed primarily to prevent corruption or the appearance of corruption on the part of appointed public officials within the context of political fundraising efforts. While earlier opinions of this Office have carved out certain exceptions regarding compensation such as the "de minimus" rule noted above and the impact of a candidate's (albeit also an appointed official) forgoing compensation, this Office does not believe that the conclusion regarding a candidate/appointed official's forgoing

3. Persons are not considered compensated if they merely are reimbursed for actual expenses incurred or on a "per diem" basis provided the per diem rate reasonably reflects actual expenses and can be substantiated. See AO-91-09.

4. AO-90-10 did not discuss the basis for this conclusion other than to conclude by analogy that if a candidate can be exempted from section 13 by taking a uncompensated leave of absence for the specified period of time, then simply forgoing compensation would have the same result.

compensation should be extended to a non-candidate appointed official.⁵

It is clear that the basis of the opinions creating the exceptions noted above fail to consider the purpose of the legislative decision to compensate certain position. The decision to compensate must be recognized as reflecting the legislature's judgment that a specific position is particularly important as a matter of public policy. Hence, the Office's previous emphasis on whether a person excepts the compensation was misplaced. The issue is not whether a person needs, wants or accepts compensation but whether the legislature has designated that position as a compensated (and important) one and, therefore, subject to section 13. Indeed, the Office's earlier position logically leads to the conclusion that a commissioner or secretariat could solicit political contributions even from people subject to his or her jurisdiction if the employee were wealthy enough to forgo his or her salary, a patently absurd conclusion. Such reasoning results in a public policy that says that those who can afford to forgo salary can solicit political contributions while those who are not so fortunate may not. Such a result would defeat the very purpose of the statute. I note that this conclusion is consistent with a recent decision of the State Ethics Commission. See EC-COI-92-12.

II. Specific Questions - As noted above, the answers to your specific questions flow directly from the conclusion that a Board member is a "person employed for compensation . . . by the commonwealth" regardless of whether you forgo compensation.

A. May a Board member serve on the finance committee of a candidate's election campaign committee? No.

Since participation on a finance committee, unless it involves purely clerical functions, would constitute indirect solicitation under section 13 as interpreted by the Office, it would be prohibited. See IB-91-01 and advisory opinions cited therein.

B. May a Board member solicit funds on behalf of a candidate's election campaign committee? No.

Such action would constitute direct political solicitation in violation of section 13.

5. Although not required by the facts presented in this opinion, this Office would probably now conclude that a candidate/appointed official's forgoing compensation would be insufficient to remove him from the prohibitions of section 13.

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C. May a Board member receive checks made out to a candidate's election campaign committee from Massachusetts residents who are not in the service of the commonwealth, or of any county, city or town? No.

Such action would constitute receipt of a political contribution in violation of section 13 regardless of the status of the person being solicited.

D. Are the answers to questions 1-3 different if the candidate is a candidate for federal office? No.

It is the opinion of this Office that M.G.L. c.55, s.13 applies to all political solicitation regardless of whether the candidate is running for state or federal office. The Federal Election Commission has also concluded that the Federal Election Campaign Act of 1971 does not preempt this section of chapter 55. See FEC Advisory Opinion No. 89-27.

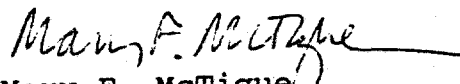
E. What constraints on Board members apply to political fundraising activities directed to individuals outside of Massachusetts?

While I decline at this time, and without further specificity from you, to respond to this general question, I note within the context of your other questions that it is this Office's opinion that M.G.L. c.55, s.13 prohibits (at the very least) Board members from directly or indirectly soliciting or receiving contributions from any person regardless of their residence or geographic location with respect to any nomination or election held in Massachusetts.

This opinion has been based solely upon the representations set forth in your letter and solely within the context of M.G.L. c.55.

Please do not hesitate to contact this Office should you have further questions regarding this or any other campaign finance matter.

Very truly yours,


Mary F. McTigue
Director